Office - Supreme Court, U.S.
FILED
DEC 17 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1891

IN THE

Supreme Court of the United States

OCTOBER TERM,1982

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT HILYER

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QUESTIONS PRESENTED

1. Whether the interest of a decedent in union pension, medical and training plans, which were funded by a collective agreement with his employer and were determined in amount by reference to his working hours, are to be included in his death benefit under Section 9 of the Longshoremen's and Harbor Workers' Compensation Act.

2. Whether in such a case the fact of his dying before a pension could "vest" under the union plan or before he would require further medical or training assistance, makes the value of his equity too speculative to be included.

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BRIEF FOR RESPONDENT HILYER

RESTATEMENT OF THE CASE

James Hilyer was killed in April 1974 in the course of tunneling work during the construction of the D.C. Metrorail System. He was employed as a laborer by the petitioner, Morrison-Knudsen Construction Company, and included as a beneficiary of a collective bargaining contract between that company and his union, Local 456 of the Laborers' District Council of Washington, D.C., and Vicinity (AFL-CIO), (PX 3, J.A. p. 36 *et. seq.*).

The contract called for an hourly work-rate which, with the usual deductions, was to be paid directly to Hilyer, and provided in addition that, for each hour of his work time, his employer would pay an additional 68¢ into three union trust funds managed, as required by Section 302(c) of the Labor-Management Relations Act of 1947, for the pension, medical and training requirements of himself and his family.

The health and welfare portion of the agreement is typical. It read as follows:

> "Section 5. The parties hereto agree to continue to operate the Health and Welfare Fund known as Laborers' District Council Trust Fund No. 3 for the benefit of the employees covered by this Collective bargaining agreement. The Employers agree to pay to such fund an amount equal to twenty-eight cents ($.28) per hour. . .for all hours worked by the employees who are covered by this Agreement. . .The trustees shall use the payments to the Fund for the benefit of the Subway and Rapid Transit Laborers, their families and dependents,. . ." Ex. 3, pp. 61-2; J.A. pp. 37-8).

The pension fund provisions were esentially similar:

> "The employers shall pay. . .($.35) per hour for all hours worked by employees. . .for the [members]. . .and their families. . ." (Ex. 3, pp. 63-4; J.A. p. 39).

The training fund at $0.05 per hour was limited to

> "...the work covered by this collective bargaining agreement"

but did not in words specify that it was earmarked for the families of members (Ex. 3, p. 65; J.A. p. 40).

Hilyer was survived by his widow, the respondent Sonia Hilyer, and his two minor sons. The amount of her death benefit under Section 9 of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"; 33 U.S.C. § 901 *et seq.*;[1] Pet. App. p. 52a) as paid by the petitioner carrier was objected to as improper under two provisions of the statute, first, that the amount should have been calculated against the annual earnings of a comparable laborer under Sec. 10(b), and second, that the carrier had excluded Hilyer's union fund interests as being any part of his compensation base.

These claims went to trial before an administrative law judge who sustained Mrs. Hilyer's Sec. 10(b) claim but denied her further claim that Hilyer's interest in the three trust funds should be included as a part of his "wages" as defined by Sec. 2 (13), (Pet. App. p. 53a).

The Benefits Review Board affirmed both rulings, and the 10(b) claim has not been further appealed. The Board denied respondent's claim to have Hilyer's trust fund equity included as part of his

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[1]Adopted by the District of Columbia in 36 D.C.C. § 501 (Pet. App. p. 50a).

compensation base, holding that the definition of "wages" in Sec. 2(13) of the LHWCA excluded speculative values.

> "This language [Sec. 2(13)] clearly implies. . .that values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage. . . [but] contributions to a pension fund reflects a belief that the employee would also continue to work for employer. . .As for the health and welfare program, this is contingent on an illness occurring. . .As for the training program, there is no indication decedent. . .was going to take advantage of it. . .
>
> "Therefore, it is clear that in this case an employee's right to these funds and the actual value of them to the injured employee is highly speculative. . .employer's contributions to the union pension, health and welfare, and training funds should not be included in a determination of an injured employee's average weekly wage. . ."

and that in any event, to do so would "negate part of the statutory scheme." (Pet. App. pp. 32a-33a)

This holding was then appealed to the United States Court of Appeals for the D.C. Circuit, where Mrs. Hilyer was supported by the Director, Office of Workers' Compensation Programs, who argued for her that in the opinion of the agency, the values of such benefits were determinable and should be included in the death benefit under Sec. 9 of the

LHWCA. The Court of Appeals agreed, holding that while the Board's reading of the "wages" definition in Sec. 2(13) was correct in that the section had been intended to include all identifiable and calculable values, its further ruling on value was wrong. The Court posed the open question as:

> "whether the benefit fund contributions are identifiable, calculable values received by the employees. We hold that they are." (Pet. App. p. 9a)

The Court of Appeals considered "unfounded" the Board's conclusion as to its inability to evaluate the payments (Pet. App. p. 12a), pointing out that Hilyer's interest could be reasonably measured by merely adding to the base rate for each of his salaried hours the 68¢ that the employer had agreed to pay through the union for his services. The Court of Appeals accordingly reversed this "speculative" conclusion by the Board and directed that Hilyer's fund equity be added to his compensation base (*id.* at pp. 13a-14a).

Morrison-Knudsen and its compensation carrier then applied to this Court for a writ of certiorari, claiming that to include such payments in compensation would contravene the words and intent of Sec. 2(13) and would result in imposing an inordinate financial burden on employers and carriers. Petitioners were joined in this view by the Director, OWCP, who reversed the prior position taken by his agency and argues before this Court for the exclusion of these moneys from Hilyer's "average weekly wage".

The application for the writ was granted by this Court on October 4, 1982.

SUMMARY OF ARGUMENT

The facts in the record concern only the manner of calculating a Section 9 death benefit under the LHWCA, *i.e.*, whether or not Hilyer's interest in the three collectively negotiated union funds should be included as a part of his "average weekly wage". Nevertheless, petitioners and their *amici* describe an array of imaginative "fringe benefits", the costs of which are claimed to compel the assessment of increased premium expense to employers. Although none of these claims were made a part of the trial record or included in the briefs on review either before the Benefits Review Board or in the Court of Appeals, they are being asserted before this Court. Lacking any meaningful record reference to them, no response thereto is being made in this brief.

The statute in plain and unambiguous words includes in the definition of "wages" all moneys paid by the employer in "recompense" for the services performed. The three fund payments to which the employer had agreed in its collective bargaining with the union are "wages" and are justly due to the employees and are agreed to be payable "money rates". But even if the contract language were still to be held to be ambiguous, a reading of the definition against the legislative intent of the statute would allow for the inclusion of such payments as a part of contemporaneous wage practices. This is shown to some extent by the legislative history of the statute, but more particularly by the overall

labor pattern which Congress has evidenced by interlinking other pension and medical enactments with the LHWCA. This conclusion is supported by reviewing the federal and state decisions which agree with the view that such moneys are a part of a worker's "wages", that the payments made into union funds are accordingly an important element of his earnings.

On the question of value the percentage of the fund interest here claimed is well below the amount which the widow and the two sons would be required to spend to secure equivalent protection from outside sources. Nor is Hilyer's interest speculative in amount. As the Court of Appeals has held, its value can reasonably be taken as equivalent to the 68¢ per hour which the petitioner-employer had agreed to pay through the union funds for Hilyer's services.

The agency has argued both sides of the question and its present stand is open and is subject to the Court's reading of the statutory language.

In conclusion, this respondent repeats that the wage definition of the LHWCA as now written is well adapted to keep abreast of the changing national concepts of "wages" and meets the current pension, medical and training needs of workers.

ARGUMENT

Statement

In the eight years of continuous litigation which have taken place since Hilyer's death in 1974, no single item of evidence has been proffered by any

party to bear on the truth or falsity of the industry claims which are now being urged on this Court. Up to this point the case has been limited to determining the includibility of contract benefits under the "wages" definition of Sec. 2(13). As petitioners say,

> "At first blush, the decision might appear to be an ordinary and narrow one of statutory construction in which the Court of Appeals simply adopted one of two equally permissible views of what the LHWCA means." (Pet. Bf. p. 6)

Respondent concedes that the described question of statutory construction is properly before the Court on this record. However, the many claims newly made before this Court of catastrophic consequence, as outlined in petitioners' brief and reechoed by the five *amici* organizations of employers and carriers, lack any factual foundation. Their truth has never been tested.

When the record was made before the law judge, it was based on determining Hilyer's "average weekly wage", in other words, whether fund payments made to a union were – for the purposes of calculating his "death benefit" – required to be included under Sec. 9. That question depends in turn on the definition of "wages" given in Sec. 2(13). As limited to that issue, the present industry arguments about potential increases in compensation premiums, as a result of temporary or permanent, partial or total disability claims for a virtually limitless variety of non-contract fringe benefits and the like, are judicially irrelevant. Such arguments should be and have been made to Congress. (S. Rep. 97-498, July 19, 1982, pp. 23-24.)

The claims made in such arguments do not assist in resolving the underlying issues of the statutory consequences of Hilyer's death. In a statute which was intended to transfer the consequences of illness or death to the employer and carrier, claiming the possibility of increased premium cost is hardly a test of statutory meaning.

When the Court of Appeals ruled that Hilyer's interest was "calculable", that Court was saying that his death did not disqualify his claim under the Act. That follows from the fact that he obviously had no further claim to be made under the plans managed by the union, could no longer "vest" a pension, would never again be ill or require yet further training. That did not change the fact that the payments previously made to these funds by his employer remained a substantial part of the contract "remuneration". The question now is whether his death had rendered this existing equity so "speculative" that it would have to be excluded from his statutory death benefit. That involves a subordinate problem of valuation since, unlike a temporarily injured worker, there could be no prospect of his ultimately returning to work.

It was these problem issues which the Court of Appeals resolved on the record, and these alone are considered in this brief.

I.

The Plain and Unambiguous Language of the LWHCA Includes Contract Fund Benefits as a Part of a Worker's "Recompense"

Under the Act, the family of a decedent receives a "death benefit" as measured by his "average weekly wage" (Sec. 9). The definition of the word "wages" is given in Sec. 2(13) of the Act and reads as follows:

"Sec. 2. When used in this Act –

. . . .

"(13) 'Wages' means *the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury,* including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer." [Italics added]

As the statute reads, Sec. 2(13) equates "wages" to the money "recompense"[2] to be paid for the worker's services. If the statutory language is specific, no further search for legislative intent is required, *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981). The rule is given in *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 283 (1980), where it was said

[2]Senate bill 1182 referred to by the Solicitor General (Fed. R. Bf. p. 19, ftn. 17) would, if enacted, revise this word to read "compensated". The difference between the two terms and the reason for the change is obvious.

> ". . . .if 'compelling language' produces incongruities, the federal courts may not avoid them by rewriting or ignoring that language."

And in footnote 27 the Court followed with approval the holding of *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 194 (1978),

> "Once the meaning of an enactment is discerned. . .the judicial process comes to an end."

Of course, there can be instances where the clarity of the language is not all that precise.

> ". . .there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language." *U.S.* v. *Turkette*, 451 U.S. 576, 580 (1981).

If we assume that the definition of "wages" in LHWCA remains ambiguous, we give below three tests of the meaning of the word, the common ("ordinary"), the contemporaneous meaning, and whether the word as read is consonant with the purpose of the statute.

(a) The common or ordinary meaning of the word "wages" is best found in the dictionary, a reference which was relied on by the Ninth Circuit when it decided *Duncanson-Harrelson Co.* v. *Director, OWCP*, 686 F.2d 1336 (Sept. 14, 1982):

> "Webster's Third New International Dictionary (1961). . .states that 'wages' often include 'amounts paid by the employer for insurance, pension, hospitalization, and other benefits.' " (Pet. Supp. Mem. 15a)

That this is the ordinary meaning of "wages" is confirmed by the action of a self-insurer in the Sixth Circuit:

> "Shipowners do not dispute the propriety of an award for fringe benefits."
> *Petition of U.S. Steel Corp.*, 436 F.2d 1256, 1274 (1970)

Another confirmation of this common reading of the word "wages" is shown by the understanding of the Bureau of Labor Statistics,

> "BLS surveyed employer expenditures for employee compensation in private nonfarm industries from 1959 through 1977. Fringe benefits such as employer expenditures for retirement programs, life insurance, health benefit programs, and unemployment benefit programs were included with 'pay for time worked' in the total compensation paid."
> Director's Bf. (Apr. 29, 1982) in *Duncanson-Harrelson Co.* v. *Director, OWCP and Freer*, p. 5, ftn. 3.

(b) The common meaning is also the "contemporaneous" meaning of the word "wage", adaptable to changes made over the years. For this we turn to the Congressional awareness of such changes in labor practices by quoting a part of the foreword to the Employee Retirement Income Security Act ("ERISA", 29 U.S.C. § 1001 *et. seq.*),

> "The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial. . .they have become an impor-

> tant factor affecting the successful development of industrial relations."

To find whether the results of such changes are included, the interpretation of a statute is important to its understanding. One can either read the words in their originally enacted connotation, or preferably in the light of their later development. The latter principle has been accepted by this Court.

> "Old laws apply to changed situations... While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within the scope of the act."
>
> *Browder* v. *United States,* 312 U.S. 335 (1941)

In *Vermilyea-Brown Co.* v. *Connell,* 335 U.S. 377 (1948), *Browder* was cited as a precedent for a contemporaneous reading of the LHWCA and applied to a leased base in Bermuda,

> "...our duty as a Court is to construe the word 'possession' as our judgment instructs us the lawmakers...would have done had they acted at the time of the legislation with the present situation in mind..." (p. 385)

and the Court pointed to the fact that the Fair Labor Standards Act had already been extended to the Bermuda Base.

With regard to the copyright statute, the Court adopted the language of the Sixth Circuit in *Twentieth Century Music Corp.* v. *Aiken,* 442 U.S. 151, 158 (1975), saying,

> ". . .the statute may be applied to new situations not anticipated by Congress if, fairly construed, such situations come within its intent and meaning. . .while statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits. . ."

The same was held to be true as to the patent statutes. In *Diamond* v. *Diehr,* 450 U.S. 175 (1981), a rubber molding process which had been developed by formula and computer was nevertheless held to be patentable since the statute was to be read in the contemporaneous sense:

> "In cases of statutory construction, we begin with the language of the statute. Unless otherwise defined, 'words will be interpreted as taking their ordinary contemporary, common meaning.' " (*Perrin* v. *U.S.,* 444 U.S. 37. . .(1979). . .)

Id., Diamond v. *Chakrabarty,* 447 U.S. 303 (1980); *Barr* v. *United States,* 324 U.S. 83 (1945).

(c) a third way in which statutory terms can be tested is by ascertaining whether the common or contemporaneous meaning furthers the solution to the problem resolved by the statute. From that point of view also, the term "wages" would include trust fund payments. We start with the fact that "wages" are defined in Sec. 2(13) as being the "recompense" of the employee. The question then is whether fund payments are considered to be part of that recompense. The courts have seen it so. Fund payments are regarded as a supplement to direct pay. In fact, it has been said that the principal pur-

pose of bargaining on such funds was to reduce the union's alternative pay demands, *International Association of Machinists and Aerospace Workers, etc.* v. *Garwood Industries,* 368 F.Supp. 357 (D.C. Ohio 1973). For that reason payments have been viewed as "wages" under the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. § 151 *et. seq.*

> ". . .this type of wage enhancement or increase, no less than any other, becomes an integral part of the whole wage structure."
>
> *Inland Steel Co.*, v.*N.L.R.B.*, 170 F.2d 247 (7th Cir. 1948).

and such payments are "conditions of employment", *United Brick and Clay Workers of America, AFL-CIO* v. *International Union of District 50, United Mine Workers of America, et al.*, 439 F.2d 311 (8 Cir. 1971), a decision which held:

> "Pensions benefits constitute wages. . . "

To include such payments in "wages" is also found in New York practice — up to the point where narrowed criminal liability might otherwise be extended, *People* v. *Vetri*, 309 N.Y. 401, 131 N.E.2d 568 (1955):

> "To be sure, the term 'wages' broadly interpreted includes all of the benefits, monetary or otherwise, which an employee derives from a master and servant relationship."

Although *United States ex rel. Sherman* v. *Carter*, 353 U.S. 210, 220 (1957), was concerned with the Miller Act and the decision does not purport to deal with a definition of "wages" as such, the Court

nevertheless did note that such fund payments were "sums justly due" to the worker, *i.e.*, formed a part of his "recompense" from the employer. *Carter* noted that the fund payments, as in Hilyer's case, were keyed to the work hours:

> "The relation of the fund contributions to the work done is emphasized by the fact that their amount was measured by the exact number of hours each employee performed services for Carter." (353 U.S. at 218).

Id., *Trustees of Colorado Corp.* v. *The Pinkard Construction Co.*, 604 P.2d 683 (Colo. 1979).

This is the view that was adopted by the Court of Appeals in this case, by the Ninth Circuit in *Duncanson-Harrelson, supra*, and by the Benefits Review Board in *Minick* v. *Levin Metals Corp.*, BRB No. 80-835 (Apr. 28, 1982). As the decision below points out (Pet. App. p. 10a, ftn. 6), the First Circuit in 1949 had already held that health plans were a part of "wages" for collective bargaining purposes, *W.W. Cross* v. *N.L.R.B.*, 174 F.2d 875, a case cited with approval in *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, 159 n. 1 (1971). The question being raised in this case is also pending before the Fifth Circuit in *Waters* v. *Farmers Export Co.*, 14 BRBS 102 (1980), (CA Nos. 81-4258 and 81-4273).

Nor are the federal courts the only fora to so view fund payments. While granting that state compensation decisions can be based on interpreting a variety of statutes, their concept of a worker's "recompense', as expressed in these state rulings,

fully agrees with the above-noted federal decisions as to the inclusive meaning of "wages".

California:

"There is no doubt that payments to a health or welfare fund made as part of the compensation for services rendered by employees are wages. . ."
People v. *Alves,* 320 P.2d 623, 624 (Cal. Sup. Ct. 1957)

"Wages include fringe benefits."
Foremost Dairies, Inc. v. *Industrial Commission,* 41 Cal. Rptr. 173 (D.C.A. 1965)

Colorado:

Such payments are part of the sums justly due the worker.
Trustees of Colorado Corp. v. *The Pinkard Const. Co., supra* at p. 16.

Michigan:

"[W]age or earnings must be deemed to include all items of compensation or advantage agreed upon in a contract for hire which is measurable in money. . ."
Hite v. Evart Products Co., 3[illegible]ich. App. 247, 191 NW.2d 136, 138 (1971).

Missouri:

A "holiday fund" set up by collective bargaining is wages, [and hence subject to garnishment against the employee although in the hands of the union].
Electrical Workers v. *IBEW-NECA Holiday Trust,* 583 SW.2d 154 (Mo. 1979).

Nebraska:

> ". . .we consider. . .employer's contributions to pension funds within the ambit of wages. . ." (478)
> *La Puzza* v. *Prom Town House Motor Inn, Inc.*, 191 Neb. 687, 217 NW.2d 472 (1974)

Nevada:

> ". . .fringe benefits are a result of [employees'] own efforts, the same as the money he puts in his pocket."
> *Genix Supply Co.* v. *Board of Trustees of Health and Insurance Fund for Carpenters Local Union #971* 438 P.2d 816 (Nev. 1968)

New York:

> "To be sure, the term 'wages' broadly interpreted includes all of the benefits. . .which an employee derives from a master and servant relationship." [liberal interpretation in civil actions, narrow in criminal]
> *People* v. *Vetri, supra* at p. 15.

In short, all known federal and state cases — except the one Arizona case referred to by the Court of Appeals (Pet. App. pp. 10a-11a, ftn. 7) — agree that a worker's "recompense" is not merely his take-home pay but includes these fund equities. The cases confirm that the term "wages" means in ordinary parlance that contract benefits are considered to be a part of an employee's wages. And the view so taken fully coincides with the "common" and "contemporaneous" connotations of the term.

These three may not be the "errorless' tests looked for in *Turkette*, but their concurrence on the meaning of the word "wages" and the fact that they further the purposes of the LHWCA indicate that the statute as written includes Hilyer's equities.

Against this virtually universal concurrence on the meaning of the word "wages", petitioners offer two arguments: first, that *Pepco* and *Embassy* are to the contrary (Pet. Bf. pp. 10, 16-18); second, that the definition of "wages" should be read in a 1927 context (*id*,. p. 17). Petitioners point only to the second portion of the definition (*id*. p. 8) or, as the Federal Respondent correctly says, the non-monetary portion, (Fed. R. Bf. p. 6), which reads,

> "...*including* the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer." [Emphasis added]

Petitioners and the Federal Respondent both assert that this section of the definition is alone applicable and that Morrison-Knudsen's payments into the union funds do not constitute a "similar advantage" within that section (Pet. Bf. pp. 8-9, Fed. R. Bf. p. 6).

On the first point petitioners argue for a "*Pepco* Principle" which is said to compel a denial of Mrs. Hilyer's claim (Pet. Bf. p. 16). The conclusion is in error. This Court in *Pepco*, (*supra,* at p. 10) pointed to the circumscribing injury schedule written into the LHWCA which required the Court to apply the Congressional language. The same type of refusal to engage in judicial invention had been the *ratio decidendi* of the earlier *United States v. Embassy Restaurant, Inc., et al.*, 359 U.S. 29 (1959), where the specific priorities of the Bankruptcy Act excluded

union plan benefits from the wages selected by Congress to be given "priority".

> "We construe the priority section of the Bankruptcy Act, not those statutes."

Although neither case would appear to be a precedent on their facts, there could be said to be a significant indicator of Congressional intention and knowledge in the separation of pay and trust benefits in setting Bankruptcy priorities.

As to petitioners' second argument, the Federal Respondent agrees that Sec. 2(13) is divided into monetary and non-monetary parts (Fed. R. Bf. p. 6) which is a further indicator of the fact that Congress intended to include in "wages", as defined in the LHWCA, every form of worker "recompense".

II

Congressional Intent Shows That Fund Interests Should Be Included In LHWCA "Wages"

The legislative history of the 1972 amendments to the LHWCA lacks clarifying discussion on this point, but as this Court stated in *Director, OWCP* v. *Rasmussen,* 440 U.S. 29 (1979)

> ". . . in 1972 Congress moved to give covered workers added protection."

and the Court previously noted that this expanded protection was one of the three basic Congressional reasons for amending the Act, *N.E. Marine Terminal Co.,* v. *Caputo,* 432 U.S. 249, 261 (1977).

The same conclusion of benefit protection can be arrived at by regarding the legislative pattern of

related pension and labor statutes, as an acceptable form of discerning intent, *Andrus* v. *Allard,* 444 U.S. 151 (1979); *United States* v. *American Trucking Assn.,* 310 U.S. 534 (1940); *United States* v. *Cooper Corp.,* 312 U.S. 600, 606 (1941). Petitioners expect this point to be argued:

> "Moreover, one could argue — as unions and claimants undoubtedly will — that if the decision below makes sense as to the LHWCA, it makes equally good sense as to other statutes such as the Federal Employees Compensation Act, and those acts governing temporary disability insurance, unemployment compensation, Social Security, and state workers' compensation programs, which include language essentially the same as LHWCA." (Pet. Cert. Bf. p. 8)

True. When the statutory scheme is read as a whole, the pattern revealed goes well beyond any merely mechanical application of *ejusdem generis.* It spells out the fact that there does exist an interlinked legislative pattern which is intended to insure the employee's receipt of his pension and welfare rights and to see that these benefits are made a part of his "recompense". The statutes referred to are as follows:

Davis-Bacon Act of 1931, 40 U.S.C. § 276, 46 Stat. 1494

> As petitioners note, this statute was amended in 1964 to include contract benefits (Pet. Bf. pp. 12, 30), a clear showing that Congress regarded such benefits as

being a part of the recompense of the employee.

Miller Act, 40 U.S.C. §§ 270 a-d

As held by this Court in *Carter*, the Congressional intent in this Act was to include all contract benefits as a part of the sums "justly due" to the employee. This case was a principal referrent of the Court of Appeals (Pet. App., p. 11a).

Social Security Act, 42 U.S.C. § 1107, 49 Stat. 642

As noted, petitioners say the wages reference of this statute is similar to that of the LHWCA. Contract benefits paid to an employee are to be counted as a part of a person's retirement income (Sec. 907), *Inland Steel, supra.*

Employee Retirement Income Security Act, ("ERISA") 88 Stat. 832, as am. by the *Multiemployer Pension Plan Amendments Act of 1980,* P.L. 96-364, 96th Cong., esp. 29 U.S.C. §1001 *et seq.*

"It is. . . the policy of this Act to protect. . .the interests of participants in private pension plans and their beneficiaries."

Contract benefits are a part of the employee's income *Alessi* v. *Raybestos Manhattan, Inc.,* ____ U.S.____, 101 Sup. Ct. 1895 (1982).

National Labor Relations Act, 49 Stat. 449, 29 U.S.C. § 151 *et seq.* am. by the *Labor-Management Relations Act,* 61 Stat. 136, 29 U.S.C. §141 *et seq.*

As this Court, the National Labor Relations Board, and many others have pointed out, contract benefits are a part of the wages of an employee and must accordingly be included in collective bargaining. As noted above, the Seventh Circuit in *Inland* had held:

> "...this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure..."

and constituted a "condition of employment" under the statutory phrase.

The importance of this Act in ascertaining Congressional intent is twofold, the inclusion of plan benefits as an integral part of wages and conditions of employment, and the direct tie-in with the LHWCA (Sec. 17(b)) raising an obligation to refund fund payments to the union when received as a part of the compensation payable under the Act, a provision similar in purpose to the following.

Federal Employees Compensation Act, 5 U.S.C. § 751 et seq.

This Act covers federal employees regarding their pay and "other benefits". As said in *United States* v. *Crystal*, 39 F.Supp. 221 (N.D.Ohio 1941), this language covers

> "...everything that the government has paid out, not only what the employee received.

> . . .the money allowance payable to an employee or his dependants and any other benefits paid for out of the compensation fund."

And, as in the LHWCA (see above) when plan benefits have been received, here from the union, there from the government, they must be refunded out of the compensation received (5 U.S.C. § 790). While a difference of language occurs between the FECA and the LHWCA, our question is whether they differ in significant purpose, i.e., whether the two taken together evidence a Congressional intent to provide the same types of remuneration for both public and private workers. The statutes suggest that this is so. In an otherwise remarkable coincidence, Sec. 7b of the LHWCA and 5 U.S.C. § 790 of the FECA each provide that when plan benefits have previously been received, they must be refunded to the union or government respectively *out of the compensation the worker receives* — which can only be read as meaning that Congress intended that the compensation to be paid in either case should include these fund benefits!

The pattern which is shown by this statutory scheme indicates not only that Congress has for many years been fully aware of the increasing use of union plans to benefit members and their families, but has enacted a series of statutes to protect the receipt of benefits by workers and their

families to insure that they would receive such moneys, and that the benefits payable under a plan would go to employees, not to the union or be returned to the employer.

Such an intent is clearly demonstrated by Title 26 where the employer avoids tax on his payments by making them to a "qualified [union] trust" under Sec. 401(a)(h)(i), and the employee is not taxed currently but only on receipt (Sec. 402 a 1), in effect a form of "deferred payment", (Note, 66 Yale L.J. 449, 458, 460), — *and the accrued rights in the "plan" cannot be forfeited by death (Sec. 411(a)3(A)).*

What argument do petitioners advance to the contrary? Essentially, that Congress' failure to revise Sec. 2(13) in 1972 was a purposive "omission",

> "Union fund contributions such as employer payments to pension plans are nowhere mentioned in the text or legislative history because they are nowhere in existence. . ." (Pet. Bf. p.22).

This argument is then supported *inter alia* by citing the adverse Congressional committee testimony given by various industry spokesmen (Pet. Bf. p. 27, ftns. 32-36). Yet the reason for the absence of change appears to be patent in the existing scope of the definition.

Petitioners' omission argument says

> ". . .it is so crucially significant that. . . no one ever suggested that the 'wages' payable under the Act did or ought to reflect an employer's pension or welfare fund contributions." (*Id.* 26).

This approach carries little weight. First, in logical parlance the argument is a circular one, *i.e.*, "if the statutory definition is inadequate, a change was required and therefore the omission of any change shows that the statutory definition was inadequate.

The same oversight or omission argument has been made before and has been uniformly rejected. In the *Inland Steel* case, *supra*, the Seventh Circuit pointed out that an argument that contract benefits were not negotiable under the NLRA because not specifically mentioned in the statute was meaningless since the same could be said as to "myriad matters" which also were not specifically mentioned. In *Director, OWCP* v. *Rasmussen*, 440 U.S. 29 (1979), the Director argued that Congress in drafting the 1972 revisions to LHWCA must have "overlooked" the desirability of putting a ceiling on death benefits, an argument rejected by this Court which noted that the legislative history of the LHWCA fully demonstrated the existence of a statutory intent to eliminate such a ceiling in death cases. In a third instance, the same omission argument was made and rejected in *Potomac Electric Power Co.* v. *Director, OWCP, supra*, at p. 10, on the ground that the claim of Congressional oversight in retaining the unambiguous injury schedules of the LHWCA could not be assumed, that the Court's responsibility was to enforce the language as drafted.

In the words used, Sec. 2(13) appears to be completely adequate to include every part of a worker's "recompense", whether monetary or not, whether paid directly to the employee or indirectly through the union. As such, there was no legislative reason

for any change. In fact, the very absence of any change by a percipient Congress which had detailed experience with pension plans is in and of itself an indication that such plans were already included within the existing language.

III

The Amount of the Employer's Fund Payment Is One Way to Measure the Value of Hilyer's Plan Equities

The Court of Appeals held:

> ". . .we think that the above quotation from the *Carter* case supports the conclusion that the most reasonable course is to measure the value of the fringe benefits by the amount of the employer's contributions to the benefit funds."

This conclusion becomes even more reasonable when it is considered that not only has there been no windfall to Mrs. Hilyer, but an increased expense. She not only lost the value of Hilyer's potential to "vest" a pension, but lost the high economic value of the group medical insurance under which he and his family were covered. Finally, in order to look for work, Mrs. Hilyer must now be retrained. To secure all of these from private sources would obviously cost her more than the percentage of the 68¢ an hour which might be added to Hilyer's death benefit. Her loss was taken note of by the Benefits Review Board:

> "Further, the amounts contributed by employer would in all likelihood not buy decedent's family similar kinds of protection." (Pet. App. p. 33a)

The Court of Appeals agreed, quoting with approval from *Hite:*

> "However, the *facts* are that at the time of the injury her employer was putting aside this potential benefit for her and that the injury prevented a continuation of this potential toward a vested interest. As a result of her injury she must find some other way of providing income for retirement."

adding as to training,

> "As for career training, that too is something the employee would have to spend his or her money to acquire. It is therefore as much an economic advantage as are the insurance policies and the pension." (Pet. App. pp. 10a-11a)

Or, as the Court quoted from the language of *W. W. Cross* v. *N.L.R.B., supra,*

> ". . . such a program provides a financial cushion. . . at less cost than such a cushion could be obtained through contracts of insurance negotiated individually."

Hilyer's present fund interest could, of course, be calculated precisely by actuaries. However, that would be a difficult and complex computation for which it would be necessary to use the fund records and membership books of the union. More practical-

ly, the values involved are reasonably well approximated by simply using the employer's hourly payments as a measure, since that is what Morrison-Knudsen had agreed to in the first place and deducted from its taxes. Assuming that the interest on the fund is offset against its administrative expenses, the payments made are still about the same amount as remained in the funds for Hilyer's ultimate benefit. Accordingly, this latter means of evaluation would appear to be quite reasonable as a measure of his portion of his earnings.

As the Court below has held, Hilyer's interest is a calculable one and not "highly speculative". Petitioners' argument that Mrs. Hilyer lost nothing by her husband's death (Pet. Bf. p. 15) seems clearly in error.

IV

The Current Agency Interpretation of the Definition of "Wages" Is Not Entitled to Special Deference

It is reiterated in the briefs of petitioners and others that

> "The Department of Labor, the federal agency charged with the administration of the LHWCA, has consistently construed the definition of "wages" to exclude an employer's trust fund contributions. This long-standing construction of the Act by its enforcing agency is entitled to considerable weight before this Court." (Pet. Bf. p. 7)

The trouble here is that there has never been such a construction and there are no agency regulations on the point. The reference given for this statement (Pet. Bf. pp. 32-33) is a 1968 memorandum (set out in full as Appx. A to Cert. Bf. of the American Insurance Association) quoting the opinion of an Assistant Solicitor:

> "In 1927, when the Longshore Act was enacted, one rarely heard of private welfare and pension funds to provide group life insurance, hospital and medical care, and pensions. These fringe benefits developed during World War II and expanded greatly thereafter. *Since* we feel bound by past practice of excluding these fringe benefit contributions from wages, it is up to Congress to provide a realistic definition of wages which will correspond to current wage customs and practices." (at pp. 3a-4a, italics added)

But the Department of Labor did not follow this waiting recommendation. The first known claim for the inclusion of benefits in wages arose in *Collins* v. *Todd Shipyards Corp.*, 5 BRBS 334, (1977), only three months before *Hilyer* was also decided by the Board. While the Department of Labor made no presentation in *Collins,* it filed a brief before the Board in *Hilyer* to the effect that if his fund interests could be shown to have "economic value", they should be included in his wages under the LHWCA. When called on by the Court of Appeals in early 1981 to state the agency opinion in court, the Department argued that Morrison-Knudsen's payments to the funds managed by Hilyer's union

should be included in his death benefit. Shortly thereafter a Department spokesman then appeared before the Ninth Circuit in *Duncanson-Harrelson* and again stated that a union pension fund interest was to be included as a part of the decedent's "wages" under the Act. When the writer of the Board's opinion in *Hilyer* became the Director of the Office of Workers' Compensation Programs, the Ninth Circuit was asked to reverse that prior statement and withhold any final decision. The request was refused. Since that time the Director has joined with petitioners in this case, although still named as a respondent.

This Court has held that the Benefits Review Board is not a "policy-making agency" and

> ". . . its interpretation of the LHWCA thus is not entitled to any special deference from the courts,"
>
> *Potomac Electric Power Co.* v. *Director, OWCP, supra,* at p. 10, (ftn. 18, p. 278)

On the other hand, an authoritative administrative construction should be given deference, *U.S.* v. *Rutherford,* 442 U.S. 544, 553 (1979), but only so long as it is reasonably derived from a statute's terms, *United States* v. *Plesha,* 352 U.S. 202 (1957); *United States* v. *Turkette,* 452 U.S. 576, 580 (1981); *F.C.C.* v. *WNCN Listeners Guild,* 450 U.S. 582 (1981).

Here the agency position is not clear. The first statement made in court by the Department of Labor was only a year ago, at which time both the District of Columbia and Ninth Circuits were told

that, in the view of the Director, fund interests such as Hilyer's were includible in death benefits under the LHWCA "wages" definition. Now the Department takes the contrary position.

It has to be admitted that an agency can reverse its view of the meaning of a statutory term, but the deference to be given to their opinion by the courts is put in question and makes it more essential to determine judicially whether the statutory term is all that ambiguous. Here, as we have pointed out above, the words used appear to support the earlier position taken by the Department and are confirmed by the common and contemporaneous meaning given to the words by the Bureau of Labor Statistics (*supra*, p. 12).

It is suggested that the contrary positions taken by the Director in 1981 and today render questionable the deference normally due to an agency interpretation.

CONCLUSION

Methods of wage determination by collective bargaining have admittedly changed in the last fifty years, primarily in the direction of emphasizing the ever-increasing economic importance of meeting the pension and medical requirements of the individual. The definition of "wages" now found in Sec. 2(13) of the LHWCA, when limited – as in this case – to the employer-supported union fund interests which have been arrived at by the process of collective bargaining, is flexible enough to incorporate such advances in industrial wage practices. These funds provide what the Board and the Court

of Appeals today have seen as essential economic values.

Nor does Hilyer's death make such values too speculative to be included in a death benefit under Sec. 9 of the Act, even absent any need to depend on the many decisions which call for a "liberal interpretation" of the Act, *e.g., Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

The ruling of the Court below should be affirmed.

Respectfully submitted,

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December 18, 1982